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Burbank Police Department Officer Gunn
8

9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11

12 PRESTON SMITH, an individual;

13 Plaintiff,

14 vs.
15

16 CITY OF BURBANK; BURBANK
17 POLICE DEPARTMENT;
BURBANK POLICE DEPARTMENT
18 OFFICER GUNN; BURBANK
POLICE DEPARTMENT OFFICER
19 BAUMGARTEN; BURBANK
POLICE DEPARTMENT OFFICER
20 EDWARDS; AND DOES 1
THROUGH 100, INCLUSIVE
21

22 Defendants.
23

Case No. CV 10-8840 VBF (AGR_x)

Honorable Valerie Baker Fairbank

**OFFICER GUNN'S NOTICE OF
MOTION AND MOTION FOR
JUDGMENT ON THE PLEADINGS**

Date: May 16, 2011

Time: 1:30 p.m.

Courtroom: 9

24 TO THE CLERK OF THE COURT, ALL INTERESTED PARTIES AND
25 THEIR ATTORNEYS OF RECORD:

26 PLEASE TAKE NOTICE that on May 16, 2011 at 1:30 p.m., or as soon as
27 thereafter as counsel may be heard, in Courtroom 9 of the above-referenced Court
28 located at 312 N. Spring Street, Los Angeles, California 90012, Defendant

1 OFFICER GUNN (hereinafter "Officer Gunn") will and does hereby move this
2 Court, pursuant to Federal Rules of Civil Procedure, Rule 12(c), for an order
3 granting judgment on the pleadings in favor of Officer Gunn and against Plaintiff
4 as to all claims for relief on the basis that Officer Gunn is entitled to judgment as
5 a matter of law.

6 Officer Gunn's Motion is made on the following grounds:

7 1. Plaintiff's Section 1983 claim against Officer Gunn is barred
8 because Plaintiff pled guilty to violating California Penal Code § 148(a)(1) and a
9 judgment in Plaintiff's favor would necessarily invalidate his conviction. *Smith v.*
10 *Hemet*, 394 F.3d 689, 695 (2005); *Smithart v. Towery*, 79 F.3d 951, 952 (9th Cir.
11 1996); and

12 2. Plaintiff's state law claims against Officer Gunn are also barred
13 because of his conviction for violating California Penal Code § 148(a)(1). *Yount*
14 *v. City of Sacramento*, 43 Cal.4th 885, 902 (2008).

15 This Motion will be based upon this Notice of Motion and Motion, the
16 Request for Judicial Notice (hereinafter "RJFN") and Exhibits thereto filed and
17 served concurrently herewith, the Declaration of Nathan A. Oyster and Exhibits
18 thereto filed and served concurrently herewith, the pleadings, documents and
19 records on file herein, and upon such other further oral or documentary matters as
20 may be presented at the hearing of this motion.

21 This Motion is made following the conference of counsel pursuant to Local
22 Rule 7-3, which took place on February 2, 2011.

23
24 Dated: April 18, 2011

LAWRENCE BEACH ALLEN & CHOI, PC

25
26 By /s/ Nathan A. Oyster
27 Nathan A. Oyster
28 Attorneys for Defendant
Burbank Police Department Officer Gunn

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

This case relates to the April 10, 2009 arrest of Plaintiff Preston Smith. Following his arrest, Plaintiff pled guilty to violating California Penal Code § 148(a)(1) – interfering with a peace officer in the lawful performance of his duties. Plaintiff also pled guilty to the possession of a controlled substance.

Plaintiff's Complaint alleges that Officer Gunn and other officers with the Burbank Police Department used excessive force against him during the course of the arrest. The Complaint is barred as a matter of law by the doctrine set forth in *Heck v. Humphrey*, because any finding in favor of Plaintiff would necessarily invalidate the Plaintiff's criminal conviction.

As discussed in detail below, Plaintiff's criminal conviction was for **all** of the events in which he interacted with Officer Gunn prior to his arrest. Plaintiff's conviction is based on his fleeing from Officer Gunn, his physical resistance to Officer Gunn and other officers from the Burbank Police Department, and Plaintiff's striking and attempts to strike officers from the Burbank Police Department. Because the criminal record is so comprehensive as to show that all of the events are subject to Plaintiff's criminal conviction, all of Plaintiff's claims are barred.

Officer Gunn moves for judgment on the pleadings as to all claims, based upon the limited issue of whether Plaintiff's claims are barred by his conviction for violating California Penal Code § 148(a)(1).

II. STATEMENT OF FACTS.

On April 10, 2009, Plaintiff and other individuals were being questioned by officers from the Burbank Police Department as they were walking in the vicinity of a liquor store in Burbank. Complaint, ¶ 16. Plaintiff alleges that Officer Gunn used excessive force on multiple occasions before other officers arrived to provide backup. *Id.*, ¶ 17. Plaintiff alleges that Officer Baumgarten and another

1 police officer, along with Officer Gunn, used excessive force as Plaintiff was
 2 being restrained and placed in handcuffs. *Id.*, ¶ 18. Plaintiff was subsequently
 3 taken to St. Joseph's Hospital for medical treatment. *Id.*, ¶ 19. There is no
 4 allegation that excessive force was used following Plaintiff's arrest. *Id.*, ¶¶ 16-19.

5 On April 14, 2009, a four-count misdemeanor complaint was filed against
 6 Plaintiff in the Los Angeles Superior Court. Ex. "A" to RJFN [Criminal
 7 complaint], 1. Count II of the complaint alleged that Plaintiff "did willfully and
 8 unlawfully resist, delay or obstruct a public officer discharging or attempting to
 9 discharge any duty of his office or employment" – a violation of California Penal
 10 Code § 148(a)(1). *Id.* The criminal complaint specifically alleged that Plaintiff
 11 committed the following acts of resistance:

- 12 • Plaintiff ran from Officer Gunn during a lawful detention and despite
 13 orders to stop. *Id.*
- 14 • Plaintiff used elbows and hands in a fist to strike Officer Baumgarten,
 15 Officer Edwards, Officer Joel, Officer Rodriguez, and Officer Gunn
 16 during the officers' attempt to lawfully restrain Plaintiff. *Id.*
- 17 • Plaintiff flailed arms and kicked legs when Officer Baumgarten, Officer
 18 Edwards, Officer Joel, Officer Rodriguez, and Officer Gunn tried to
 19 detain him. *Id.* at 1-2.

20 On April 29, 2009, Plaintiff pled guilty to violating Count II of the
 21 complaint – California Penal Code § 148(a)(1). Ex. "A" to RJFN [Criminal
 22 complaint]; Ex. "C" to RFJN [Advisement of rights], ¶¶ 2, 16, 21; Ex. "D" to
 23 RFJN [Criminal transcript] at 3:4-6. Plaintiff signed a four-page document
 24 entitled "Misdemeanor Advisement of Rights, Waiver, and Plea Form", which
 25 freely acknowledges the guilty plea. Ex. "C" to RFJN [Advisement of rights];
 26 Plaintiff's plea was approved by the Court. Ex. "B" to RFJN [Sentencing
 27 memorandum]; Ex. "D" to RFJN [Criminal transcript] at 4:5-6. Plaintiff admits
 28 that the conviction has not been expunged, withdrawn, or overturned. Ex. "E" to

1 Oyster Decl. [Stipulation re: Plaintiff's Conviction].

2 **III. PARTIES AND CLAIMS FOR RELIEF.**

3 Plaintiff in this action is Preston Smith. Defendants in this action are the
4 City of Burbank, the Burbank Police Department, Officer Baumgarten, Officer
5 Edwards, and Officer Gunn.

6 Plaintiff's Complaint contains four claims for relief – (1) a violation of his
7 Fourth Amendment rights pursuant to 42 U.S.C. § 1983, (2) California Civil Code
8 § 52.1, (3) intentional infliction of emotional distress, and (4) assault and battery.

9 **IV. STANDARD FOR MOTION FOR JUDGMENT ON THE**
10 **PLEADINGS.**

11 Officer Gunn's Motion for Judgment on the Pleadings is brought pursuant
12 to Rule 12(c) of the Federal Rules of Civil Procedure on the basis that the
13 Complaint fails to state a claim. "The principal difference between motions filed
14 pursuant to Rule 12(b) and Rule 12(c) is the time of filing. Because the motions
15 are functionally identical, the same standard of review applicable to a Rule 12(b)
16 motion applies to its Rule 12(c) analog." *Dworkin v. Hustler Magazine Inc.*, 867
17 F.2d 1188, 1192 (9th Cir. 1989).

18 The analogous Rule 12(b)(6) provides that an action will be dismissed for
19 failure to state a claim upon which relief may be granted. Conclusory allegations
20 of law or unwarranted inferences of fact urged by the nonmoving party are
21 insufficient to defeat a motion to dismiss. *Ove v. Gwinn*, 264 F.3d 817, 821 (9th
22 Cir. 2001) (emphasis added). In addition, a court's obligation to construe
23 allegations in the light most favorable to the nonmoving party does not mean that
24 those allegations must be construed in a light favorable to the nonmoving party, if
25 such a construction cannot reasonably be made. *Id.* Moreover, dismissal is
26 proper if there is either a "lack of a cognizable legal theory" or "the absence of
27 sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica*
28 *Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).

V. **PLAINTIFF'S SECTION 1983 CLAIMS ARE BARRED BY HIS
CONVICTION FOR VIOLATING PENAL CODE § 148.**

Plaintiff's Section 1983 claim against Officer Gunn is barred by the long-standing doctrine that a civil rights plaintiff cannot pursue a claim that could call into question his criminal conviction. In *Heck v. Humphrey*, the Supreme Court held that:

“[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.... A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is *not* cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed....”

Heck, 512 U.S. at 486-487, 114 S.Ct. 2364.

“When a plaintiff who has been convicted of a crime under state law seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the validity of his conviction or sentence.” *Hooper v. County of San Diego*, 629 F.3d 1127, 1130 (9th Cir. 2011) (internal quotations and citations omitted). “If the answer is yes, the suit is barred.” *Id.*

1 According to *Heck*, “if a criminal conviction arising out of the same facts
2 stands and is fundamentally inconsistent with the unlawful behavior for which
3 section 1983 damages are sought, the 1983 action must be dismissed.” *Smith v.*
4 *Hemet*, 394 F.3d 689, 695 (2005); *Smithart v. Towery*, 79 F.3d 951, 952 (9th Cir.
5 1996). “As the Supreme Court explained, the relevant question is which success
6 in a subsequent § 1983 action would ‘necessarily imply’ or ‘demonstrate’ the
7 invalidity of the earlier conviction or sentence under § 148(a)(1).” *Smith*, 394
8 F.3d at 695; citing *Heck*, 512 U.S. at 487.

9 Federal district courts have held that *Heck v. Humphrey* bars a plaintiff’s
10 Section 1983 action for excessive force absent proof that a conviction under Penal
11 Code § 148(a) has been invalidated by appeal or other proceeding. *Franklin v.*
12 *County of Riverside*, 971 F.Supp. 1332, 1336 (C.D.Cal. 1997); *Nuno v. County of*
13 *San Bernardino*, 58 F.Supp.2d 1127, 1133-1134 (C.D.Cal. 1999). Because
14 Plaintiff’s conviction has not been invalidated, his Section 1983 claim against
15 Officer Gunn should be dismissed.

16 In the recent Ninth Circuit case of *Hooper v. County of San Diego*, the
17 plaintiff pled guilty to a violation of California Penal Code § 148(a)(1). *Id.* at
18 1129. The plaintiff was arrested on suspicion of petty theft and for possession of
19 methamphetamines. *Id.* She did not dispute the lawfulness of her arrest, nor did
20 she dispute that she resisted arrest. *Id.* Instead, she contended that the arresting
21 officer used excessive force in response to her arrest. *Id.* In *Hooper*, a police dog
22 eventually bit the plaintiff’s head on two occasions during a struggle following
23 her arrest. *Id.*

24 Relying upon the California Supreme Court’s interpretation of California
25 Penal Code § 148(a)(1) in *Yount*, the Ninth Circuit stated that “a conviction under
26 § 148(a)(1) requires only that some lawful police conduct was resisted, delayed,
27 or obstructed during that continuous chain of events.” *Id.* at 1131. The Ninth
28 Circuit ultimately concluded that the plaintiff’s conviction in *Hooper* did not bar

1 her Section 1983 claim, stating “that a conviction under California Penal Code §
2 148(a)(1) does not bar a § 1983 claim for excessive force under *Heck* when the
3 conviction and the § 1983 claim are based on different action during ‘one
4 continuous transaction.’” *Id.* at 1134.

5 Although the Ninth Circuit and the California Supreme Court have
6 identified factual scenarios in which a Penal Code § 148(a)(1) conviction would
7 not be inconsistent with a finding that a police used excessive force, those factual
8 scenarios are not present here. *Smith*, 394 F.3d at 696; *Yount v. City of*
9 *Sacramento*, 43 Cal.4th 885, 899 (2008). For example, in *Smith*, the plaintiff
10 alleged that the officers used excessive force during multiple interactions with
11 him, but the criminal records was inconclusive as to what conduct was the basis
12 for the criminal conviction. *Smith*, 394 F.3d at 699. Without a better explanation
13 for why the plaintiff was convicted, the Ninth Circuit found that the plaintiff
14 could have been convicted for conduct during the first encounter and still proven
15 excessive force during a later encounter without disturbing the conviction. *Id.*

16 In this action, the criminal record prevents Plaintiff from making the same
17 argument. As set forth in the statement of facts, the criminal record demonstrates
18 that Plaintiff violated Penal Code § 148(a)(1) during the entire period of time that
19 he interacted with Officer Gunn. Neither Plaintiff nor his criminal counsel
20 limited the scope of the factual basis for Plaintiff's guilty plea. Ex. “E” to Oyster
21 Decl. [Criminal transcript] at 1:9-5:25. The criminal record, therefore, precludes
22 a finding that Officer Gunn used excessive force.

23 Furthermore, to the extent that Plaintiff's Section 1983 claim is based on a
24 false arrest allegation, this claim also fails. Not only did Plaintiff plead guilty to
25 violating Penal Code § 148(a)(1), he also pled guilty to being under the influence
26 of cocaine – Health and Safety Code § 11550(a). Ex. “A” to RJFN [Criminal
27 complaint]; Ex. “C” to RFJN [Advisement of rights], ¶¶ 2, 16, 21.

1 **VI. PLAINTIFF'S STATE LAW CLAIMS ARE ALSO BARRED BY HIS**
2 **CONVICTION FOR VIOLATING CALIFORNIA PENAL CODE §**
3 **148(a)(1).**

4 The California Supreme Court has applied the *Heck* principle to claims
5 brought under California law. *Yount v. City of Sacramento*, 43 Cal.4th 885, 902
6 (2008). “[W]e cannot think of a reason to distinguish between section 1983 and a
7 state tort claim arising from the same alleged misconduct...” *Id.* Therefore,
8 Plaintiff’s state law claims for California Civil Code § 52.1, intentional infliction
9 of emotional distress, and assault and battery should be dismissed as well.

10 **VII. CONCLUSION.**

11 For the foregoing reasons, Officer Gunn requests that the Court dismiss all
12 claims against him.

13
14 Dated: April 18, 2011

LAWRENCE BEACH ALLEN & CHOI, PC

15
16
17 By /s/ Nathan A. Oyster
18 Nathan A. Oyster
Attorneys for Defendant
Burbank Police Department Officer Gunn